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NANA REGIONAL CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON,
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA
INCORPORATED,

Defendant,

NANA REGIONAL CORPORATION, and
NORTHWEST ARCTIC BOROUGH,

Intervenor-Defendants.

Case No.: A:04-cv-0049 (JWS)

**JOINT REPLY IN SUPPORT OF
JOINT MOTION TO STRIKE
PLAINTIFFS' NEW EXPERT
REPORTS [RE: DOCKET 218]**

I. INTRODUCTION

In its Order of August 9, 2007, (Order) the Court allowed updates to expert reports only "to take into account any effects resulting from the passage of time." In producing 96 pages of new expert reports last month, the Plaintiffs' experts did much more. They repackaged many of their old opinions and presented numerous new ones. Accordingly, the Plaintiffs' experts' new reports should be struck, except for those portions of the reports that update to reflect the passage of time the opinions they previously expressed.

II. ABSENT A MOTION, THIS COURT ALLOWED UPDATES TO EXPERT REPORTS ONLY “TO TAKE INTO ACCOUNT ANY EFFECTS RESULTING FROM THE PASSAGE OF TIME.”

In light of the Plaintiffs’ stridency and attempt to confuse the issues in their Opposition to the Joint Motion to Strike New Expert Opinions (Opposition), reviewing the requirements set by the Court for new expert opinions is in order. The Court held a planning conference in this matter on August 9, 2007. At the conference, Plaintiffs’ counsel raised the issue of updating expert reports. In raising the issue, counsel only mentioned updating expert testimony regarding economic issues. Plaintiffs’ counsel noted that at trial the length of time “that the experts would be considering in terms of economic benefit in this case is obviously longer than they had considered.”¹

When questioned by the Court as to whether he had “anything in mind other than bringing calculations and opinions forward based on the passage of time,” Plaintiffs’ counsel admitted he did, if the Court was amenable to it.² After some discussion, the Court held that it would not resolve at the planning conference the question of whether new expert opinions would be allowed. Instead, the Court directed that if Plaintiffs wanted to introduce any new opinions, they were to file a motion by August 31.³ The Court stated that unless counsel succeeded with such a motion, “the only thing I will direct the parties to do is to update the existing admissible expert reports to take into account the passage of time.”⁴

This is in fact what the Court did in its Order at Docket 167. The Court directed that the parties experts “shall update their reports to take into account any effects resulting from the passage of time from the date used in the original report through December 31, 2007.”⁵

The Court, accordingly, created a two prong approach to updating expert reports.

¹ Exhibit O, Transcript of excerpts of August 9, 2007 planning conference, p. 2

² *Id.*

³ *Id.*, p. 5.

⁴ *Id.*, p. 4.

⁵ Doc. 167.

1 Experts could revise their reports without further permission from the Court to take “into
2 account the effects resulting from the passage of time from the date used in the original
3 report through December 31, 2007.”⁶ As to any other desired revisions, parties were
4 required to first seek and receive permission from the Court.

5 This dichotomy is important. The Court signaled that updating opinions and
6 reports just to take into account the effects resulting from the passage of time would not
7 trigger additional discovery. By contrast, new opinions could or would.⁷ Filing a motion
8 seeking permission to offer new opinions, therefore, would provide the defendants with
9 an opportunity to agree or object to the request. It also would afford defendants a chance
10 to request any additional discovery, such as updating its experts’ reports and deposing the
11 Plaintiffs’ expert, they deemed warranted. The Court being fully advised then could
12 decide whether to allow the new opinion(s).

13 In short, following the process established by the Court the Plaintiffs could only
14 offer new opinions *after* (1) Plaintiffs had filed a request for permission to do so, (2)
15 Defendants had an opportunity to respond to Plaintiffs’ request, and (3) the Court granted
16 Plaintiffs’ request. The Court at no point indicated its Order would not apply if the
17 Plaintiffs’ new opinions were based on what Plaintiffs considered “new” evidence.⁸

18 ⁶ *Id.*

19 ⁷ Exhibit O, p. 3.

20 ⁸ Plaintiffs appear to argue that because Teck Cominco did not produce certain
21 documents to them until after August 31, 2007 deadline for filing a motion for leave,
22 they should be excused from filing such a motion. Opposition to Motion to Strike
23 Plaintiff’s New Expert Reports (Opposition), p. 5. There are three flaws in this
24 argument. First, no party - including Plaintiffs – is entitled to ignore the Court’s Order
25 on the grounds that another party violated it. Second, the Court set August 31 as the
26 deadline for both Teck Cominco’s document production and Plaintiffs’ motion seeking
27 permission to provide additional expert testimony. In so doing, the Court signaled it did
28 not necessarily expect Plaintiffs to have all of Teck Cominco’s newly-produced
documents before filing their expert testimony motion. Rather, Plaintiffs’ motion, if
filed, apparently was expected to address evidence and opinions of which Plaintiffs’
already were aware as of August 2008. Plaintiffs did not ask the Court to set the
schedule differently. Third, Plaintiffs attempt to justify a number of their experts’ new
opinions by reference to spreadsheets provided them in April 2005. Opposition, p. 9. As
will be explained below, the spreadsheets did not in fact contain any new information.
But to the extent Plaintiffs thought they did, and to the extent Plaintiffs wanted to offer
new expert opinions based on them, they could have filed a timely motion seeking leave
to do so. By August 2007, they had had the spreadsheets for over two years.

III. THE PLAINTIFFS IGNORED THE COURT'S ORDER.

At the August 9 hearing, the Court set controls on the introduction of new expert opinions. Plaintiffs have chosen to ignore those limits. This is readily evident from even a superficial review of the Plaintiffs' experts' new reports. Only two of Teck Cominco's five retained experts produced updated reports. They total approximately 20 pages in length.⁹ All four of Plaintiffs' retained experts, by contrast, prepared new reports. They total just shy of 100 pages in length.

As explained in the Joint Motion, only a small part of Plaintiffs' expert's reports actually constitute updates of opinions previously expressed to take into account effects resulting from the passage of time.¹⁰ Teck Cominco and NANA have carefully reviewed the new reports, indicated the sections that satisfy those criteria and highlighted them.¹¹ Contrary to Plaintiffs' arguments, the remaining portions of the new reports consist of three different kinds of opinions that are not permitted by the Court's Order.

A. Plaintiffs' experts' new reports are comprised primarily of three different kinds of opinions not allowed by the Court's Order.

1. Much of the Plaintiff's experts' new reports consists of repackaged opinions from earlier reports and declarations

Plaintiffs have had their experts repackage a lot of their previous reports and declarations in their new reports. For instance, Plaintiffs on the one hand assert that Mr. Fischer's report is appropriately updated, which would mean that all it does is update his past opinions to take into account the effects resulting from the passage of time. Yet they also assert that his report is "literally an electronic combination of his earlier expressed opinions" and "contains no new opinions ..., not even any updates."¹² If this is true, the report should be struck in its entirety. It does not fall within the narrow scope for updated reports created by the Court. Teck Cominco and NANA, however, concluded

⁹ See Declaration of Jim Torgerson in Support of Reply.

¹⁰ Joint Motion and Memorandum in Support of Motion to Strike Plaintiff's New Expert Reports (Joint Motion), p. 4, fn 13.

¹¹ *Id.*

¹² Doc. 258 at 5.

1 there are portions of his reports that are permissible updates.¹³ They will stand by their
 2 analysis, despite Plaintiffs' concession, and ask that all of Mr. Fischer's report except the
 3 parts to which they did not object be stricken.

4 Likewise, Dr. Moran's new report is replete with repackaging. For instance, the
 5 second full paragraph on page 12 of his report is almost identical to paragraph 52 of his
 6 December 2005 declaration at docket 124, except that the new report adds "and research
 7 laboratories" in the second sentence, deletes "on" and adds "identically labeled" in the
 8 third sentence, and deletes "Most importantly" at the beginning of the last sentence.
 9 Another example comes from page 27 of his new report.¹⁴ The first full paragraph on
 10 page 27 is almost identical to paragraph 36 of his November 2004 report¹⁵ except that the
 11 new report adds "from 1998 until June 15, 2004" and "which was then raised to 3900
 12 mg/L" in the second sentence, and deletes "and even the much higher TDS levels in
 13 Consent Orders issued by the U.S. EPA" at the end of the fourth sentence.

14 These are but a few examples. To identify all such instances of such revisions of
 15 repackaging in the new reports cannot be done within the space allowed for this brief.

16 It is not clear why Plaintiffs' have done this, given that their revised or repackaged
 17 opinions so clearly failed to satisfy the Court's criteria for acceptable updates. It may be
 18 they believe that by including all their repackaged opinions in their new reports they can
 19 disguise, and make it more difficult for the Court to identify, their new opinions. It may
 20 be that they hope to secure the admissibility of opinions previously set forth only in
 21 declarations attached to various motions. For instance, in a footnote, Plaintiffs assert that
 22 their experts' declarations were "in essence, updates required by Rule 26 to their original
 23 expert reports."¹⁶ This issue is not before the Court so Teck Cominco and NANA will
 24 not engage it except to note that (1) they do not necessarily agree with Plaintiffs'

25
 26 ¹³ Exhibit D to Joint Motion, Doc. 219-5. For simplicity, Defendants refer to the
 page numbers as they appear on the reports.

27 ¹⁴ Exhibit B to Joint Motion, Doc. 219-3.

28 ¹⁵ Exhibit F to Joint Motion, Doc. 219-6.

¹⁶ Doc. 258 at 4, n. 1.

1 assertion and (2) the argument is inconsistent with Plaintiffs' argument in their
 2 Opposition that they should be allowed to revise their expert reports based on any
 3 evidence, such as the spreadsheets discussed below, disclosed after the expert's earlier
 4 reports but before their declarations.

5 Ultimately, Plaintiffs' motives do not matter. What matters is simply the fact that
 6 Plaintiffs' repackaged opinions do not satisfy the requirements set by the Court in its
 7 Order of August 9. Such opinions should be struck from plaintiffs' experts' new reports.

8 **2. Much of the Plaintiff's experts' new reports consists of new**
 9 **opinions based on "old" evidence.**

10 The Plaintiffs do not even try to defend their experts' opinions based on "old"
 11 evidence available to the Plaintiffs before November 2004 when they prepared their
 12 earlier reports. Instead, they use several other tactics to try to salvage them. First, they
 13 just deny that any of their opinions are based on old evidence, asserting instead that all of
 14 their opinions are based on new evidence that Teck Cominco just provided.¹⁷ This is not
 15 true, as will be discussed below using the example of the oft-cited spreadsheets. Second,
 16 they attempted to disguise these opinions by including them in the mix with other
 17 opinions, some of which are permissible under the Court's Order. What they do not do,
 18 but should have, is ask the Court for leave before attempting to present any new
 19 opinions, whether based on "old" or "new" evidence.

20 **3. Much of the Plaintiff's experts' new reports consists of new**
 21 **opinions based on "new" evidence**

22 Plaintiffs core argument seems to be that they are entitled to proffer any opinion
 23 they can tie to "new" evidence, which designation they appear to give to all discovery
 24 provided to them after August 31, 2007. They adopt a tone of righteous outrage at Teck
 25 Cominco's and NANA's "supreme chutzpah" for even challenging such opinions and
 26 demand sanctions.¹⁸ But Plaintiffs are not relieved of the requirement to seek permission
 27 to introduce new opinions even if a proffered opinion is in some way based on "new"

28 ¹⁷ Opposition, p.4.

¹⁸ Opposition, pp. 2, 14.

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evidence. Viewing the Plaintiffs' position most generously, they appear to have confused the Court's permission to update past opinions to "take into account any effects resulting from the passage of time"¹⁹ with permission to do wholesale updates to their reports to take into account any evidence they did not know about when they prepared their earlier reports. This, of course, is not what the Court said.²⁰

Further, "facts are stubborn things"²¹ and the facts here are not what plaintiffs say they are. Much of the allegedly new evidence upon which Plaintiffs' experts rely Plaintiffs in fact have had for years.

For example, Dr. Moran and Mr. Fucik both offer new opinions based on information that was available at the time they prepared their earlier reports.²² Dr. Moran's new opinions included his views on procedures that should be in place at Red Dog Mine and the importance of independent analyses, neither of which is an opinion susceptible to updating to take into account the effects resulting from the passage of time since 2004.²³ Plaintiffs argue that Dr. Moran's "observations are appropriate summarizing opinions based on the new material available to Dr. Moran after he produced his expert report in November 2004."²⁴ Plaintiffs' argument is a *non sequitur*. It says nothing, because Plaintiffs cannot, about how Dr. Moran's new opinions take into account the effects resulting from the passage of time. They should be struck, just as should his opinions (1) regarding how the timing of sampling affects the concentrations

¹⁹ Doc. 167.

²⁰ *Id.*

²¹ John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770

²² Dr. Moran's new report offered several such new opinions, including on pages 6, 12, 13-19, and 27. Exhibit B to Joint Motion, doc. 219-3. Mr. Fucik also offered such opinions, including on pages 10, 13, 14, and 16-22. Exhibit C to Joint Motion, Doc. 219-4.

²³ By way of example, Dr. Moran opined that in his experience: "having independent on-site oversight or inspections of mining facilities improves the incentives for those mining facilities to comply with their permit limitations. These independent observers must have formal training in environmental monitoring and data interpretation." Exhibit B to Joint Motion, Doc. 219-3, p. 27.

²⁴ Doc. 258 at 8.

1 reported²⁵ and (2) regarding acceptable approaches for reporting determinations from
2 labs²⁶.

3 Plaintiffs tried to justify some of Dr. Moran's and Mr. Fucik's other new
4 opinions²⁷ by claiming they are based on newly-disclosed evidence, referring to two
5 spreadsheets Teck Cominco produced to plaintiffs in April 2005, after Dr. Moran's
6 earlier report was completed.²⁸ Similarly, regarding Mr. Fucik's new opinions, Plaintiffs
7 assert that the "data was in the spreadsheet disclosed to Adams in April 2005, after Mr.
8 Fucik's original expert report was served in November 2004."²⁹

9 This argument fails for at least four reasons. First, the spreadsheets (Trial
10 Exhibits 71 & 72) were disclosed in April 2005, after the Plaintiffs' experts had prepared
11 their original reports. But the spreadsheets contain the same data as (1) the lab reports
12 and results produced to Plaintiffs before Plaintiffs' experts prepared their original reports,
13 (2) the DMRs produced to and/or available to Plaintiffs prior to the date of the original
14 expert reports, or (3) both.³⁰ In short, the spreadsheets do not contain "new" evidence,
15 even using Plaintiffs' meaning for the word.

16 Second, Plaintiffs' claim that Dr. Moran and Mr. Fucik relied on the spreadsheets
17 in preparing their new reports is not credible. With one exception, when they identified
18 their source information, neither Dr. Moran nor Mr. Fucik indicate that they relied on the
19 spreadsheets.³¹ The one exception is on the bottom of page 11 of Mr. Fucik's new
20
21

22 ²⁵ Exhibit B to Joint Motion, Doc. 219-3, p. 6.

23 ²⁶ Exhibit B to Joint Motion, Doc. 219-3, p. 12.

24 ²⁷ See Dr. Moran's new opinions on pages 13-19. Exhibit B to Joint Motion, Doc. 219-3. See Mr. Fucik's new opinions on pages 10, 14, and 16-22. Exhibit C to Joint Motion, Doc. 219-4.

25 ²⁸ Doc. 258 at 8.

26 ²⁹ Doc. 258 at 9.

27 ³⁰ Exhibit P, Declaration of Joe Diehl, ¶¶ 4-8; Exhibit Q, Declaration of Rachel Davis, ¶¶ 3-7.

28 ³¹ Plaintiffs indicate that the spreadsheets are included as Exhibits 70-71 to Plaintiffs' Exhibit List, Docket 190. Doc. 258 at 9. This appears to be a typographical error and instead Plaintiffs should have referred to Plaintiffs' Exhibits 71-72. Exhibit 70 is September 2007 lab reports.

1 report.³²

2 Third, if Plaintiffs wished to provide additional testimony based on information in
3 the spreadsheets disclosed in April 2005, the Court set a deadline of August 31, 2007, for
4 Plaintiffs to file a motion for permission to do so. They certainly had time to seek the
5 necessary permission. They chose not to, and should not be allowed to now escape the
6 consequences of their choice.

7 Fourth and last, even if the spreadsheets were “new” evidence, that would not
8 relieve the Plaintiffs from the requirement, under the Court’s Order, of seeking leave
9 before proffering a new opinion about a subject other than the “effects resulting from the
10 passage of time.”

11 Mr. Fucik also offers new opinions in the first two paragraphs under TDS on page
12 13 of his report.³³ The new opinions address Teck Cominco expert Gene Andrews’ 1999
13 and 2004 reports. Plaintiffs assert that these opinions were provided in earlier
14 declarations filed in 2005 but fail to provide a citation.³⁴ Mr. Fucik provided only one
15 declaration in 2005, attached to docket 124. The opinions do not appear in that
16 declaration.

17 Next, Plaintiffs assert that some of Dr. Moran and Mr. Fucik’s new opinions are
18 based on documents provided in November 2007 and January 2008.³⁵ Plaintiffs argue
19

20 ³² Exhibit C to Joint Motion, Doc. 219-4. Because in this one instance one of the
21 Plaintiffs’ witnesses claimed in his report to have relied on the spreadsheets, Teck
22 Cominco and NANA did not object to Mr. Fucik’s new opinions in the last paragraph of
23 page 11 of his new report, continuing through the chart on page 12, even though an
24 objection would have been proper because the opinions are beyond what the Court
25 allowed. Prompted by the Plaintiffs’ sudden discovery that a number of their experts’
26 new opinions relied on the spreadsheets, Teck Cominco and NANA investigated whether
27 the spreadsheets in fact contain any new evidence. As discussed above, they do not.

28 From a principled approach, Mr. Fucik’s new opinions on pages 11 and 12 should
be struck because they do not take into account the effects resulting from the passage of
time. But Teck Cominco and NANA will not object now because they did not raise the
objection in the Joint Motion at Docket 218.

26 ³³ Exhibit C to Joint Motion, Doc. 219-4.

27 ³⁴ Doc. 258 at 9.

28 ³⁵ The new opinions Plaintiffs assert are based on documents disclosed since
November 2007 are Dr. Moran’s new opinions offered at pps. 7-10 and 19-25 (Exhibit B
to Joint Motion, Doc 219-3), and Mr. Fucik’s new opinions offered at pp. 14-16 and 22-

(Footnote Continued)

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1 that Dr. Moran and Mr. Fucik offered these new opinions for the first time in their new
2 reports “because [they] had never had access to the data before.”³⁶ Defendants agree that
3 the 2005-2007 data was disclosed after the original 2004 reports, but the experts are
4 limited to updating their reports to take into account “any effects resulting from the
5 passage of time.” Because neither Dr. Moran nor Mr. Fucik had included similar tables
6 for any of the years 1999-2004 in their earlier reports, the new tables for 2005-2007 by
7 definition cannot be updates allowed by the Court’s Order.

8 Again, even if the documents should have been disclosed earlier, that is not a
9 justification for Plaintiffs’ violation of the Court’s Order. If Plaintiffs wanted to offer
10 additional expert testimony based on the documents provided after August 31, 2007, they
11 should have filed a motion seeking permission to do so.

12 **B. Dr. Kavanaugh’s new report should be struck in its entirety.**

13 Dr. Kavanaugh’s new report suffers from many of the same infirmities discussed
14 above as well as some that are unique. It is not an update reflecting the effects resulting
15 from the passage of time. It is instead an assortment of new opinions, partly “to address
16 the Court’s rulings,”³⁷ all presented without permission from the Court to do so.

17 First, Dr. Kavanaugh apparently has replaced his calculations using data from
18 Teck Cominco Alaska Incorporated. Dr. Kavanaugh indicates that in his 2004 report, he
19 “used information from Teck Cominco Limited to plug the gap” and that in his 2008
20 report he was careful not “to use any data at all from Teck Cominco Limited.”³⁸ Stated
21 most clearly, in the earlier report Dr. Kavanaugh calculated economic benefit that he
22 attributed to the parent company. In his 2008 report, he attributed the economic benefit
23 due to noncompliance with TDS permit limitations to the subsidiary. This change
24 obviously has nothing to do with taking into account “effects resulting from the passage
25

26 27 (Exhibit C to Joint Motion, Doc 219-4). Plaintiffs admit that the summary provided
27 by Mr. Fucik is “almost identical to the summary offered by Dr. Moran.” Doc. 258 at 10.

³⁶ Doc. 258 at 6 and 10.

³⁷ Exhibit E to Joint Motion, Doc. 219-5, at 1, n.1.

³⁸ Declaration of Dr. Kavanaugh, ¶¶ 3-4.

1 of time.” It is instead an effort to address testimony stricken from his earlier report. As
 2 to other testimony from this very witness that Plaintiffs wanted to update to respond to
 3 the Court’s order, the Court instructed Plaintiffs at the planning conference on August 9
 4 that they would need to file a motion. That is what Plaintiffs should have done here if
 5 they wanted these new opinions of Dr. Kavanaugh admitted.³⁹

6 Second, Dr. Kavanaugh changed the data used in his ability-to-pay calculation.
 7 He admits that he added an additional earlier year to his calculations.⁴⁰

8 Third, there are substantial differences between the cash flows Dr. Kavanaugh
 9 used in his earlier report⁴¹ and his new report.⁴² For example, on page nine of his initial
 10 expert report, he provided the following data as representing “TCAI’s annual net income
 11 from Red Dog’s operations adjusted for depreciation, a non-cash cost”:

12	1999: \$143,406,000
13	2000: \$103,238,000
14	2001: \$2,587,000
15	2002: -\$4,327,000
16	2003: \$9,197,000

17 But on page 13 of his January 18, 2008 expert report, Dr. Kavanaugh provided the
 18 following data as the “cash flow from operations for TCAI as reported” for those same
 19 years:

20	1999: \$69,402,000
21	2000: \$71,917,000
22	2001: \$1,555,000
23	2002: \$77,000
24	2003: \$36,078,000

25 Dr. Kavanaugh used the first data set in the ability-to-pay calculations he provided in his
 26 2004 expert report. He used the second set of data as part of the data set for his ability-
 27 to-pay calculations in his 2008 update of his 2004 report.

28 Between the two reports, Dr. Kavanaugh did something more than just update his

³⁹ Exhibit O, pp. 3-4.

⁴⁰ Declaration of Dr. Kavanaugh, ¶ 9.

⁴¹ Exhibit M to Joint Motion, Doc. 219-8, at 9.

⁴² Exhibit E to Joint Motion, Doc. 219-5, at 13.

1 time series for the passage of time (i.e., add additional data for additional years). Instead,
2 he changed the concepts behind the data he selected for use in his ability-to-pay analyses.

3 These revisions are not updates to take into account any effects resulting from the
4 passage of time. They are new opinions that violate the Court's Order and that should be
5 stricken.

6 **IV. THE COURT SHOULD STRIKE ALL OF THE PLAINTIFFS' EXPERTS'**
7 **NEW REPORTS EXCEPT THOSE PORTIONS THAT ADDRESS THE**
8 **EFFECTS, IF ANY, RESULTING FROM THE PASSAGE OF TIME**
9 **SINCE THE DATE OF THE ORIGINAL REPORT THROUGH**
10 **DECEMBER 31, 2007.**

11 To be permissible, the contents of the Plaintiffs' experts' new opinions must meet
12 two requirements. They must be an update, which is to say that they can not be
13 something newly disclosed for the first time in 2008, and they must be limited to "taking
14 into account any effects resulting from the passage of time from the date used in the
15 original report through December 31, 2007." If there was no opinion expressed in the
16 original report, by definition there cannot be an updated opinion taking into account any
17 effects resulting from the passage of time from the date used in the original report
18 through December 31, 2007. Further, only some opinions will be susceptible to being
19 updated. The opinion must be of a nature such that the passage of time could and did
20 have some effect on the earlier expressed opinion. That is why not all of Teck
21 Cominco's experts updated their reports. Not all opinions will change over time.

22 Because the portions of the Plaintiffs' experts' new reports to which Teck
23 Cominco and NANA object do not meet the Court's requirements, they should be struck.

24 Plaintiff's counter by arguing for sanctions against Teck Cominco and NANA for
25 having the temerity to file the Joint Motion.⁴³ Calling the Joint Motion "frivolous,"
26 Plaintiffs allege that it seeks to "penalize plaintiffs for using the late-disclosed documents
27 in their updated expert reports."

28 ⁴³ Opposition, p 14.

But that is not what Teck Cominco and NANA argue. Instead, they assert that in fact most of the Plaintiffs' new opinions are based on information Plaintiffs have possessed for years. As to the discovery produced to Plaintiffs in 2007 and 2008, Teck Cominco and NANA have not addressed whether Plaintiffs' experts should or should not be able to use that information. That issue has not be put before the Court in a cognizable manner. Teck Cominco and NANA simply ask the Court to enforce its Order and limit the Plaintiffs' updated expert opinions in the manner stated the Order. If the Plaintiffs want to introduce any new opinions, they should be required to file a motion that the defendants can then respond to on its merits.

It is not "supreme chutzpah" to expect the Plaintiffs will follow the Court's Order, nor is it "supreme chutzpah" to ask the Court to enforce its Order. If the label must be applied to some party in this dispute it better fits the Plaintiffs, who responded to being called on their violation of the Court's Order by asking for sanctions against Teck Cominco and NANA, and in some instances misrepresenting the evidentiary basis of their experts' new opinions. Plaintiffs' shrillness should not obscure their failure to comply with the Court's Order regarding new expert opinions. The Joint Motion should be granted.⁴⁴

Dated: February 29, 2008

Respectfully submitted,

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⁴⁴ Alternatively, at a minimum, Defendants should be afforded an opportunity to provide supplemental expert reports and depose Plaintiffs' experts regarding their new reports.

Dated: February 29, 2008

Respectfully submitted,

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TECK COMINCO ALASKA INCORPORATED

By /s/ Sean Halloran
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **JOINT REPLY TO MOTION TO STRIKE PLAINTIFFS' NEW EXPERT REPORTS** was served via the method indicated below this 29th day of February, 2008, on the following parties:

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